

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Anthony Dailey, # 09694-021,)	C/A No. 0:04-1378-RBH
)	
Petitioner,)	
)	
vs.)	ORDER
)	
United States of America,)	
)	
Respondent.)	
)	

Petitioner, a federal inmate proceeding *pro se*, seeks relief pursuant to 28 U.S.C. § 2241. Petitioner filed his petition on May 14, 2004. Petitioner requests that he be granted prior jail credit for time spent in state custody while under “Federal jurisdiction,” and also requests a downward departure of sentence pursuant to the United States Sentencing Guidelines.

In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02 this matter comes before the Court with the Report and Recommendation of United States Magistrate Bristow Marchant filed February 23, 2005. This Court is charged with making a *de novo* determination of any portion of the Report and Recommendation of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b).

Based on his review of the record, the Magistrate Judge concluded that the Petitioner’s § 2241 action should be dismissed because petitioner’s downward departure claim is cognizable only under § 2255. Further, the Magistrate Judge found that, while petitioner could pursue his claim that the

Bureau of Prisons has failed to credit him for prior time served, he has not exhausted his administrative remedy as to that claim. As such, the Magistrate Judge recommended that the petition be dismissed without prejudice.

The Magistrate Judge advised petitioner of the procedures and requirements for filing objections to the Report. On March 14, 2005, petitioner filed a response to the Report agreeing with the Magistrate Judge and asking that his case be dismissed without prejudice.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a *de novo* determination of those portions of the report and recommendation to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

The Court has reviewed the Report, pleadings, memoranda, and applicable law. The court adopts the Report and Recommendation and incorporates it herein by reference. Accordingly, the case is **DISMISSED *without prejudice***.

IT IS SO ORDERED.

s/ R. Bryan Harwell

R. Bryan Harwell

United States District Judge

May 25, 2005
Florence, SC